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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REBECCA A. BOOSTROM,

Petitioner,

--v.--

STEPHEN BACH,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Is due process denied in a Small Claims court when Summary Judgement is granted when the court does not state it is hearing the Defendant's Motion for Summary Judgement, does not have oral argument,does not receive evidence, and asks only the defendant, an attorney representing himself, two questions in legal terminology about his allegations on the statute of limitations during the time the court stated it was hearing a motion filed by the Plaintiff, pro se.

2. Does the Indiana Supreme Court's first impressions opinion interpreting a Small Claims Rule to create a new requirement that paying a Small Claims filing fee is a prerequisite to commence a Small Claims action a denial of due process by lack of notice of the law by rule to unrepresented Small Claims plaintiff(s) who follow all the many detailed requirements in said rule.

LIST OF PARTIES

Petitioner:

Rebecca A. Boostrom

Respondent:

Stephen C. Bach

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REFERENCES TO OPINIONS BELOW

The opinion of the Indiana Supreme Court is found at 622 N.E. 2d 175 and J.A.3-13 and J.A. 14.

The opinions of the Indiana Court

of Appeals are found at 589 N.E. 2d 275 (J.A. 15-23) and 603 N.E. 2d 867 (J.A. 24-33).

The Small Claims courtroom ruling is found at J.A. 34-35, and entry of summary judgement, supplied, at J.A. 36-38.

GROUNDS OF JURISDICTION

The opinion of the Indiana Court of Appeals was rendered on April 6, 1992. The opinion of the Court of Appeals on the petition for rehearing was rendered on November 23, 1992. J.A. .The opinion of the Indiana Supreme Court was rendered on October 26, 1993. J.A. . The Indiana Supreme Court denied (a) the Petition for Rehearing without an opinion, on February 23, 1994.

This Court has jurisdiction under 28 U.S.C. § 1254 and § 1257.

CONSTITUTIONAL ARTICLE INVOLVED

This case involves the United States Constitution, Fourteenth Amendment, article 1. J.A.

STATEMENT OF THE CASE

No appeals opinion in the Indiana appellate courts has considered the question of the lack of due process of no hearing on Mr. Bach's Motion for Summary Judgement prior to entry of summary judgement. The Court of Appeals used statutory construction to interpret the Small Claims statutes and rules in its opinion that the rules did not give notice of any law about a filing fee in Small Claims, but the Indiana Supreme Court vacated their opinion and did rulemaking of added a requirement of a filing fee within its opinion.

In the lower court, Ms. Boostrom raised the question of lack of due process of notice of the law by arguing that Indiana T.R. 3 does not state a filing fee is required, and tried to present a prominent Indiana law authority of Indiana Forms of Pleading and Practice which stated that a filing fee was not a prerequisite to commencement of an

action, and she stated she knew from experience that the law allowed a filing fee to be paid late in the Court of Appeals and the Indiana Supreme Court.

The lower court denied her "Motion to Correct Minutes" of the filemark date of the complaint for the reasons that she knew the "rules" required a filing fee because she had paid filing fees previously. The court did not address in its ruling or entry the key question of law of whether the law required a filing fee to be paid as a prerequisite to filing a complaint, and where in the law that the average unrepresented Small Claims plaintiff was informed of any such requirement controlling the filing of a complaint or if the Small Claims plaintiff was informed of the consequences of late payment of a filing fee.

In the lower court, prior to entry[1] of

[1] The Defendant Bach himself pro se composed the subsequent written "Entry of Judgement."(Transcript,Record,p. 117, ln. 11-14; "Second Motion to Correct Error,"Exhibit A,Record p. 52-53; Record, p. 54); Docket of June 4, 1990, Record,p.69. Ms. Boostrom had no time allowed to

summary judgement, Ms. Boostrom had no opportunity to raise an objection to the lack of due process of no hearing on Bach's Motion for Summary Judgement. During the hearing of June 4, 1990, Ms. Boostrom was unable to know the court would not have a due process hearing on Bach's motion prior to its ruling, but ask Bach only two questions in legal terminology about his motion.

The Plaintiff filed a Motion to Correct Error, which was unrequired by Indiana law in 1990, and it was denied without an opinion. R. 40-42.

In the Indiana Court of Appeals, Ms. Boostrom continued the issue of lack of due process of a required hearing in her *Appellant's Brief*, Issue No. 2.[2] In the

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object to the submitted entry. Following prior local custom, the judgement was backdated to the hearing date.

[2] Appellant's Brief, Ind. Ct. of App., reads:"Issue No. 2
The lower court erred by law, by procedure, and by irrefutable evidence of the transcript that can only lead to one conclusion that the court erred in granting summary judgement without a hearing on the Motion for Summary Judgement and filed Responses, and

Appellant's Reply Brief, pp. 5-14, she replied to Appellee's Issue No. 1 on the grounds of lack of due process of a hearing. Ms. Boostrom continued the issue of lack of due process of notice of a requirement of a filing fee to commence an action in her Issue No. 1 with which the Court of Appeals agreed. Opinion J.A. 15-23.

The Court of Appeals explained why it was not giving an opinion on all[3] of Ms. Boostrom's issues as required by Indiana law. Thereafter, in the Indiana appellate courts, the issue of lack of due process of a hearing on Bach's motion prior to summary judgement was not addressed in an opinion.

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for granting a Motion for Summary Judgement in Small Claims court while a Motion to Transfer to the Superior Court was pending."

[3] "Issue": "Boostrom presents three issues for our review; however, because we reverse, we only need to address the following :

Did the trial court err when it refused to order that the Complaint, which was not accompanied by a filing fee, be file-marked the date of its certified mailing?" (Boostrom vs. Bach, Court of Appeals, 1992, 589 N.E. 2d 275 at 276)

In response to Bach's Petition for Rehearing, the Court of Appeals in its dicta supported its prior dicta that two motions were heard without addressing the issue of lack of due process hearing. J.A. 24-33.

In the *Appellant's Brief in Opposition to Transfer*, Ms. Boostrom argued again the prior issue of lack of a due process hearing and incorporated by reference her prior argument: in response to Bach's Issue A (App. Br.pp. 2-3); and in response to Bach's Issue No. B (App. Br., pp.4-5).[4]

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[4] The relevant portions read:
"Ms. Boostrom was not allowed to give all her reasons for not wanting the court to hear the 'Motion for Summary Judgement,' but only to indicate a Petition for Transfer was pending. The Appellant incorporates as her authority the Record of the transcript and incorporates all her prior documentation of quotes from specific parts of the transcript showing that the court only heard the 'Motion to Correct Minutes.' These quotes from the transcript in the Record are found in the Appellant's Brief (first brief) to the Court of Appeals under Issue No. 2, pages 12-16, and also in the Appellant's Reply Brief to the Court of Appeals in reply to Appellee's Issue No. 3, with quotes from the transcript found on pp. 5-14 of the Appellant Boostrom's Reply Brief to the Court of Appeals." (*App. Br. in Opposition to Transfer*, p. 2-3)...

"The lower court, however, never conducted a hearing of the issue of the statue of limitations for the Plaintiff-Appellant to present an oral argument or evidence regarding when the statute of limitations would expire or what statute applied.

"The transcript (Record, 71-117) presented irrefutable proof that can only lead to one conclusion

The transfer Opinion of the Indiana Supreme Court did not address the issue of lack of a full adversarial hearing of Bach's Motion for Summary Judgement in affirming the grant of summary judgement while addressing only the question of whether the filing fee in Small Claims controls the statute of limitations. J.A. 3-13.

The Appellant timely filed an "Appellant's Petition for Rehearing of the Petition to Transfer" and raised the question of lack of due process of notice of a requirement of a filing fee in Small Claims in numbered paragraphs Nos. 8, 9, 10, 11, 12, 13, and raised the question of lack of due process of a hearing on Bach's motion for full adversarial argument on the accrual date

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that after the Judge Pro-Temp announced he would hear the "Motion to Correct Minutes," he only heard evidence regarding the file-mark date of the complaint and never announced he was going to hear the Motion for Summary Judgement"....

"Only the question of the file-mark date of the complaint was fully adjudicated after the Small Claims court announced he would hear a 'Motion to Correct Minutes' and prior to when he gave his ruling.'" (*App. Br. in Opposition to Transfer*,pp. 4-5).

and the statute of limitations in Nos. 14, 15, 16, and showed the merit of argument she should be able to present if a due process hearing was held in No. 17, 18, 20.

While the Petition for Rehearing Transfer was pending, Ms. Boostrom filed a "Petition to Accept a Late Brief of More than Fifty Page" and tendered *Appellant's Brief in Support of Her Petition for Rehearing of Transfer*. According to amended appellate rules in Indiana, her petition could have been granted, especially because she was proceeding pro se, was a graduate student, working, and been sick. Said brief was "received" but not "filed" and considered.

Also, while the Petition for Rehearing transfer was pending, Ms. Boostrom had filed Appellant's Motion to Supplement the Record of the Proceedings for Petition for Rehearing Transfer[5] for a legible copy of the

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[5] The appellant, pro se, followed the Indiana custom to tender a one volume of a supplement to the Record of certified copies of Orderbook entries with her motion to supplement the Record. This supplement was important (1) to file a legible copy of the Withdrawal order entered February 19, 1988 (2) a

withdrawal order and copies of orderbook entries showing a local custom (now extinct) then existed whereby Ind. T.R. 72(D) was not followed in Vanderburgh courts.

The Indiana Supreme Court did not rule if it would supplement the record or accept a late brief permissible by law.

Then, the Indiana Supreme Court denied Ms. Boostrom's petition for rehearing without an opinion. J.A. 14.

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legible copy was important for readability of the "Received Feb 19, 1988 County Clerk" stamp of the Clerk of the Court because this stamp showed that the nunc pro tunc entry was not done due to clerical delay, because the clerk filed it in the orderbook the same day received. Instead, the nunc pro tunc entry followed a local custom contradictory to T.R. 72 (D) to backdate all entries of orders and judgements to the date of the hearing.

On February 1, 1994, Bach filed a response to her motion to supplement, wherein Bach acknowledged that such a local custom of backdating all orders and judgements by nunc pro tunc stamps to the dates of hearings existed at that time in Vanderburgh courts.

The supplement of certified orderbook entries from the underling cause and this cause showed such a local custom was habitually done 45 years after Ind. T.R. 72 (D) was amended. Now T.R. 72(D) is followed.

This supplement was important to show Bach's alleged accrual date of January 19,1988 could not have been even an arguable accrual date because the clerk did not receive until February 19, 1988 the order for withdrawal, and it was entered the same day on February 19, 1988. The nunc pro tunc backdating received a due process hearing, but none was held, and the docket didn't show Ms. Boostrom was informed of the order.

This case originated in the Small Claims court as a malpractice case against Stephen Bach, attorney, by his former client, Rebecca Boostrom, who proceeded pro se, for breach of a representation contract to represent her in a then pending Vanderburgh Superior Court Cause No. 85-CIV-748 (R. 140 Docket in underlying cause). At the time this Small Claims complaint was filed in early 1990 (R 3-6), and from the prior January 1989 onward, Ms. Boostrom has had no attorney to represent her in said Vanderburgh County Superior Court cause, now in appeal (R, 138-140, docket in underlying cause).

In December, 1984, when Mr. Bach began to advise Ms. Boostrom, and on February 10, 1985, Attorney Stephen Bach, with co-counsel Russell Armstrong, signed a contingency fee representation contract with Rebecca Boostrom to represent her in litigation.(R 4-5, Complaint, Contract of Representation).

On July 5, 1985 then co-counsel Bach and Armstrong acting on behalf of Ms.

Boostrom filed a damages action against the Title Insurance Company of Minnesota for breach of contract and Ray L.Clark and Barbara D. Clark, for trespass and conversion of real property and income therefrom, in Vanderburgh Superior Cause No. 85-CIV-748. R 132, Complaint for Damages (R 142-149 and Paragraph II (R 150-152).

On November 7, 1986, a decision to grant summary judgement to said title insurer was granted after Bach filed no response for his client, but no judgement entry was made in the orderbook. (R. Docket, 133).

On January 12, 1988, said Defendants Clark in 85-CIV-748, filed seven motions to dismiss/for summary judgement of conversion, punitive damages, and damages, and the third scheduled trial date was vacated.(R. 135-136).. One week later, on January 19, 1988, Mr. Bach and his co-counsel filed to withdraw from representation. Said motion was heard the same hour and the court made a decision approving withdrawal.R. Docket,

p.135-136).

On February 19, 1988, the order approving withdrawal was entered in the orderbook.(R. 131). The "received Feb 19, 1988 County Clerk" stamp of the clerk on the original is illegible on the copy Bach filed. (R 131). The docket does not show Ms. Boostrom was notified of a nunc pro tunc entry (Docket, Record, 136).

In said the pending underlying damages action, Vanderburgh Superior Cause No. 85-CIV-748, the said Clarks filed many motions on the issue of res judicata due to a prior quiet title action in which Attorney David Hatfield has represented Ms. Boostrom. The motions and rulings on said issue of res judicata between the quiet title action and the damages action are represented in the docket entries of 9-5-85, 9-12-86, 11-3-86, 11-7-86, 1-5-87, 3-26-87, 1-12-86, 5-6-88, 5-9-88, 7-28-88, 11-10-88, 2-15-88 , 6-9-89, 6-23-89, 6-27-89, 2-26-90(R, 132-140). The 2-15-89 motion for summary judgement on res

judicata was pending awaiting appointment of a special judge in early 1990 when Ms. Boostrom, without representation in said underlying cause, sued Mr. Bach for breach of representation contract.

The allegations of malpractice and breach of contract against Ms. Bach are in the complaint (R 3-6) and More Detailed Statement (R 12-22). Since 1989, Ms. Boostrom has been without representation in said underlying cause, now in appeal. Her teaching career and alternate academic degree plans have been interrupted for years now by needing to study law on her own to represent herself pro se in the underlying cause.

REASONS FOR REVIEW

The Indiana Supreme Court's opinion denies due process of notice of the law governing and controlling the substantive rights of unrepresented Small Claims plaintiffs

because: (1) there is no published Small Claims rule that states a filing fee is required or when or why ; Cf. Ind. Sm. R. 2, J.A. 73 ; (2) the Vanderburgh Superior Court, Small Claims Division, prior to 1994 did not publish a Small Claims Manual as required by Ind. Sm.C. R 13, J.A. 75 ; (3) the Vanderburgh Superior Court, Small Claims Division, local rules for Small Claims, do not require a filing fee; (4) Indiana Statute,I.C. § 33-11.6-4-6, states that the procedure for Small Claims shall be "established by rule," not by caselaw creating a requirement, in simple language so "any person" can file and proceed in a case unrepresented ; (5) the Indiana Supreme Court composes the Small Claims rules and did not amend prior to or after their opinion in this cause to state a filing fee was required;

(6) "any person" in Small Claims cannot find law books or know how to read them;

(7) the Small Claims statute does not state a

filing fee must be paid prior to filing a complaint and the definition of clerk does not include the clerk for the Small Claims court of this case; (7) the Respondent relied on a statute for only Marion County (seat of the capital) in this Vanderburgh County case, and did not find and cite a caselaw, a rule, or a statute for Vanderburgh County Small Claims, so how could an unrepresented person be expected to know one; (8) the Indiana Court of Appeals gave an opinion there was no rule, statute, or law requiring a filing fee prior to commencement of an action, so how could an unrepresented Small Claims party know any different law than the Court of Appeals used; (9) the first impressions opinion of this case requiring a filing fee to commence an action will be hidden away in a law library, and will be unavailable to typical unrepresented Small Claims plaintiffs, and the rulemaking of this new interpretation denies due process of notice by an easy-to-read rule readily

available to Small Claims unrepresented persons; (10) the opinion of the Indiana Supreme Court on its Small Claims Rule 2 (a) overlooks its own description of the multiple requirement for commencement of an action found in part (b) of the same rule, and is contrary to statutory construction law that the plain and clear language of a rule cannot be changed by adding elements to a rule not found therein, especially when the legislature has a statute the procedure shall be by simple rules easy to understand and to follow by unrepresented persons.

Furthermore, this Indiana Supreme Court's opinion is putting two more stringent requirements of paying the filing fee and filing the summons as a prerequisite to commencement of an action in Small Claims than is found in existent caselaw and Indiana authority for commencement of an action under T.R. 3 for Superior court cases. Unrepresented persons should not have stricter requirements than represented person

for equal access to the courts and so wealth discrimination does not operate in Small Claims courts.

The question for review is important to society because the law has greatly protected the rights of indigents and prisoners, but now more focus in the law should be turned to the small claims of working people who may work double to twenty times as many hours for the same amount of money as others. Their constitutional right to a substantive law hearing of their substantive rights should be protected by literally applying the simple, plain English rules (especially when easily readable rules are required by statute as in this cause) designed to guide them to their access to the courts for redress of any injustice and monetary recompense needed for their livelihood.

Can this right of free access to the courts of justice be altered by a form of wealth discrimination seen in how Small Claims litigants without counsel are barred

from using the court system for the lack of clear Small Claims rules?

This Petitioner asks the United States Supreme Court to expand its concept of "wealth discrimination" and " [A] century of Supreme Court adjudication under the Equal Protection Clause" discussed in *San Antonio Indian School District v. Rodriguez, 411 U.S. 1* 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) and to apply an expanded concept of "wealth discrimination" to Small Claims courts where "wealth discrimination" can cause an unrepresented party to be unable to find, to understand, or to follow caselaw and statutes, while the same person, if literate, would be able to follow readily available clear, easily understood, and simple Small Claims rules of court reprinted in a Small Claims court manual available in the Clerk's office.

2. The Indiana Supreme Court has erred in its opinion to uphold a summary judgement

for Bach, an attorney representing himself, without a hearing on his motion. A motion for summary judgement requires a due process hearing. Setting Bach's motion to be heard is not a substitute for a full adversarial hearing of his motion. In Small Claims, by rule, all defenses are preserved without a written response. Ms. Boostrom filed three responses, but all the courts have never addressed two of her filed responses. The Small Claims rules have no explanation for how the unrepresented person can defend himself/herself against a motion for summary judgement filed by a lawyer, and therefore the Small Claims court must guide an unrepresented person in how to present defenses, even defenses unknown as legal defenses to unrepresented parties.

In this case, court stated it was hearing Ms. Boostrom's Motion to Correct Minutes, heard oral argument on her motion and received exhibits into evidence on her motion, and ninety-nine percent of the

transcript is on her motion or extraneous matters. During the hearing of her motion, the court interrupted her presentation of a standard Indiana authority stating filing fees could be paid late to perfect a complaint in order to ask the defendant, an attorney, technically phrased questions about his allegations on the accrual date and the statute of limitations. The court controlled the discussion and the court did not ask the plaintiff the same questions either in plain English or in legal terminology. When the defendant attempted to self-initiate a presentation of his motion, the plaintiff objected and her objections were sustained by the court each time or else the defendant himself got back on the subject of the plaintiff's motion being heard. Finally, at the end of the hearing on Ms. Boostrom's motion to correct minutes of the filemark date of the complaint, the court stated affirmative agreement to Ms. Boostrom's request that Bach's motion for summary

judgement would not be heard until after a ruling was made on her motion to correct the minutes of the filemark date of the complaint. J.A. 40-71.

The court never stated on June 4, 1990 that it was hearing the Motion for Summary Judgement, never heard oral argument, and never received any exhibits into evidence on Bach's motion. When the court interrupted Ms. Boostrom's presentation of Indiana authority on the filing fee to ask Bach a question, she had reason to believe the court interrupted ner in order to know how much time and argument to hear on her motion by a preview of the weight of the ruling on her motion with regard to Bach's allegations in his motion. She had no way of knowing that the court would not hear Bach's motion, would never ask her the same questions it had asked Bach, and would rule on his motion after asking Bach only two questions phrased in very legal terminology the ordinary person cannot understand, including Ms. Boostrom at

that time in 1990.

Armstrong v. Manzo 380 U.S. 545 at 552 states: "A fundamental requirement of due process if the "opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385."* Summary judgement are not "appropriate 'where motive and intent play leading roles." *Poller v. Columbia Braodcasting System*, 368 U.S. 464. Pp. 259-261" *White Motor Co. v. United States*, 372 U.S. 253 at 253.In *United States v. Continental Oil*, 377 U.S. 161 was remanded after there was no hearing and when no specific findings were made.

With the current growing popularity of motions for summary judgement in Small Claims courts by parties able to afford counsel, the lack of a due process hearing of a motion for summary judgement against unrepresented parties is an important question for review.

It is the right of a U.S. citizen "to come to the seat of government to assert any claim he may have upon that government, to

transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to the seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states." *Crandall v. Nevada, 73 U.S.* 35, 18 L. Ed. 745.

The Indiana Supreme Court gave a new first impressions interpretation of law that three documents: Filing Fee, Summons,and Complaint in Small Claims are "necessary to commencement of her action" (Op. Cit., p. 6).

A plaintiff cannot "control" when the rules don't inform him/her how to "control the presentation of documents or what documents to

present or when or why. The Indiana Supreme Court or the legislature "controls" what is to be presented for commencement of an action by the plain and clear wording they should use in composing rules or statutes. The Indiana Supreme Court should not require more in this one case than what the small claims rule specified requires. The Court of Appeals used statutory interpretation to apply as written the Small Claims rules and Indiana Small Claims statutes, and therefore opinion was *not* a new interpretation of law, but merely an application of law as written:

> "[2] Here, the Complaint should have been filemarked the date it was sent by certified mail--January 12, 1990. There is no statute, rule or case law stating that filing fees must be paid in small claims courts before complaints will be filed.
> (Boostrom vs. Bach, 589 N.E. 2d 275 at 277)

Attorney Bach, Appellee, likewise in his Issue D, Transfer Brief, cited no caselaw, no statute for Small Claims (except one for Marion County exclusively), no rule, and no authority that stated that filing fees must be paid to commence an action. Yet transfer was

granted on his Issue D, not on any other issue Bach presented. Because Bach could find no authority in contradiction to the Court of Appeals' statutory application of the laws already written, no small claims plaintiffs should be required to know law Bach could not find and cite. The Indiana Court of Appeals opinions were based on the constitutional concept of due process of law by notice of the law, i.e., a person cannot be required to pay a filing fee to commence an action if there is no statute, no rule, and no law stating that paying a filing fee is a prerequisite to filing a complaint. Any person (as Ms. Boostrom) cannot be required to do something more than what the law gives notice it requires.

To be noted, the Indiana Supreme Court acknowledged in its opinion (supra) that the complaint was "filed" on January 12, 1990. It used the very technical word "filed" (in the past tense). This technical word "filed" is also found in T.R. 3: " "A civil action is

commenced by filing [emphasis added] a complaint with the court or such equivalent pleading or document as may be specified by statute."

"I.C. 1-1-4-1
Section 1. The construction of all statutes of this state shall be by the following rules, unless the construction is plainly repugnant to the intent of the legislature or of the context of the statute:
(1) Words and phrases shall be taken in their plain, or ordinary and usual, sense. Technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. West's Indiana Code (1993)

Indiana's Trial Rule 3 states:

"A civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute." T.R. 3

For Superior Court cases, T.R. 3 is to have a "literal" interpretation in Indiana: Geiger and Peters, Inc. v. American Fletcher National Bank & Trust Co., Ind. App. (1981):

"The plain wording of T.R. 3 is that the filing of a complaint or equivalent pleading commences an action. The Indiana Supreme Court has held "[i]n adopting the rule [T.R. 3] we effectively adopted the Federal rule...and in so doing, we adopted the

construction which the Federal Courts have placed on the rule." [citations omitted] *State ex rel Long v. Marion Superior Court Civil Division* [1981] Ind., 418 N.E. 2d 218, 219. Hence we look to the federal case law for assistance in determining whether the statute of limitations is tolled by the filing of a complaint.

[2] Literal compliance with T.R. 3 by filing a complaint commences the cause of action and is sufficient to toll the statute of limitations. [emphasis added] [citations omitted]

(*Geiger and Peters, Inc. v. American Fletcher National Bank & Trust Co.*, Ind. App. (1981), 428 N.E. 2d 1279 at 1282)

The Indiana Civil Code Study Commission's idea of "one rule" needs attention. "One rule" (i.e, T.R. 3) now applies to the commencement of various kinds of actions at various jurisdictional levels in the judicial system. One example used above was a "judicial review of administrative actions" "initiated by pleadings denominated by other names" originally commenced under T.R. 3 at the appellate level, not at the lower court level. A new action is commenced under T.R. 3 at the Indiana Supreme Court level, not initially in the lower court, by filing

a "certiorari from decision of board of zoning appeals" (a "document as specified by statute" about zoning appeals). " One rule, therefore, will apply to all such court proceedings except criminal cases" (Ibid.).The "one rule" for commencing an action at all levels of jurisdictions is applicable due to the amendment of Rule 2--ONE FORM OF ACTION (s) There shall be one (1) form of action to be known as "civil action." (Laws of the State of Indiana, 1967, Chapter 191, p. 546). Because there is now "one rule" (T.R. 3) for "commencement of an action," then it follows in reasoning that if the filing of a petition for judicial review in the Indiana Supreme Court (without the timely payment of the filing fee) tolls the applicable statute of limitations, then likewise, the filing of a similar complaint or document (without prepayment of a filing fee) will also toll the applicable statute of limitations in the other courts.

The Indiana Supreme Court has already decided that the untimely payment of the required appellate filing fees will not preclude the timely commencement of an action initiated under T.R. 3 in the Court of Appeals or in the Indiana Supreme Court.

The intention of the legislature reflected in the "one rule" comments of the Civil Code Study Commission should be now honored and heard in a due process hearing. Why should this clearly stated concept of "one rule" for initiating commencement of an action at all jurisdictional levels by the filing of a grievance be negated by interpreting T.R. 3 radically differently for the lower courts than it is interpreted for the appellate courts? The instant Court of Appeals' applied this "one rule" for commencement of an action at all levels of jurisdiction in Indiana in their reasoning.

"Moreover, while there are no cases directly on point, we find to be instructive the case of Brady v. Eastern Indiana Production Credit Association (1978), Ind., 396 N.E. 2d

335. There, the record for the appeal was timely filed, but the filing fee was late. Consequently, the appeal was dismissed. On transfer, the dismissal was reversed by the Indiana Supreme Court, which stated as follows: It is hereby directed that the case of Brady v. Eastern Indiana Production Credit Assoc. (1977), Ind. App. 360 N.E. 2d 1267, be remanded to the Court of Appeals for consideration of the merits. This Court finds the reasoning of the dissent more in line with our stated policy to reach the merits of a case whenever possible. Additionally, this court relies on the case of Peters et al. V. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration Society, Ind. (1971), 257 Ind. 360, 274 N.E> 2d 530, wherein this Court, under the former transfer filing fee statue, held the untimely receipt of the fee by the Clerk was not grounds for dismissal where the petition to transfer was timely filed. Thus, in applying the reasoning of Peters, supra, to this case we believe the untimely payment and receipt of the filing fee should not be grounds for automatic dismissal where the record is timely filed, as here. Brady, 396 N.E. 2d at 335 [citations omitted].
"We also note our decision here is supported by case law in other jurisdictions."
(Boostrom vs. Bach, 589 N.E. 2d 275 at 277)

Prior to when Federal Rule 3 was adopted, Indiana law had clearly referred to the different components of commencing an action:

> "A civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be

deemed to be commenced from the time of issuing the summons***.' Burns', 1946 Repl. § 2-802 (Jensen v. Fagan, Ind. App, (1964), 199 N.E. 2d 716 at 717)

When Federal Rule 3 was adopted in Indiana in 1970, if the then Indiana Supreme Court had wanted the filing of the summons and the filing fee to be prerequisite for the commencement of an action, the Supreme Court or the legislature had a chance to control the documents, but did not.

"In construing a statute, words should be accorded their plain and ordinary meaning. Trustees of Indiana University v. County Department of Public Welfare of Kosciusko County, (1981) Ind. App. 426." Barr v. Sun Exploration Co. Inc. v. Barr, Ind. App. (1982) 436 N.E. 2d 821.

Previously unconsidered is a practical "how to do it" comparison between a great authority in law, William F. Harvey, and a Small Claims unrepresented plaintiff. If William F. Harvey did not include a "step" to pay a filing fee and a "step" to file the summons in his steps for what to do for

the "commencement of an action, the Indiana Supreme Court is making an unreasonable requirement of any Small Claims unrepresented plaintiff when the Small Claims rule doesn't state what to do.

William F. Harvey in Indiana Practice has a practical step-by-step what to do procedure of closely following Superior Court T.R. 3 and T.R. 4. In Harvey's close reading of the trial rules, this foremost legal authority on Indiana law does not state in any step[1] that either (1)the filing fee and/or (2) the summons have to be filed to commence an action. These two filings are not stated. Harvey is faithful to the wording of Trial Rule 3; therefore, he omits those steps in his step-by-step listing of what is to be done to follow Rule 3.

Also, in 3.4 Additional Thoughts at the Commencement of an Action,[2] Harvey adds no "additional thoughts" about any payment of the filing fee or filing of the summons to

commence an action, but remains as silent. He has remained silent because the rule makes no requirement of paying the filing fee or filing the summons to commence an action. Also, no statute or caselaw has made that requirement.

Likewise, in Harvey's chapter of "Trial Rule 4: PROCESS," there is nothing in this chapter about any requirement to pay or anything about payment of the filing fee. Also, under Trial Rule 4, Harvey does not ever state or ever imply that filing the summons commences the action.

Harvey's discussion[3] of commencement of the action is all under T.R. 3. 1 William F. Harvey, Indiana Practice 71-79 (2d ed. 1987).

Furthermore, the Small Claims rules say nothing about "filing fee" or "summons," and so filing them should not be a prerequisite to commencement of a Small Claims action.

Also, if unrepresented Small Claims

plaintiffs could not know an issue never defined in a rule. As Kenneth M. Stroud, Professor of Law, and James W. Torke, Professor of Law, Indiana University School of Law--Indianapolis stated in Indiana Forms of Pleading and Practice (1990), in their analysis of "Commencement of Action":

"[2] Under Federal Rule 3 there is a split in authority as to whether an action is properly commenced without payment of the filing fee, but the **more recent cases hold that payment of the fee is not required for the action to be commenced. Indiana courts should follow the example of the more recent federal cases.**" (Trial Rule 1, Federal Rule 3.06, Indiana Forms of Pleading and Practice.)

3.07 When is a Complaint "Filed" with the Court?

"Trial Rule 5 provides that the filing of pleading and papers with the court " as required by these rules" shall be made by:

(1)...[in person]
(2) mailing the papers to the clerk by registered or certified mail return receipt requested (in which case filing is complete upon mailing) or
(3)...[with judge]

The federal courts have been liberal in their construction of what constitutes sufficient delivery to the clerk for the purposes of filing **in order to avoid harsh results such as the running of the statute of limitations.**" [emphasis

added] (Trial Rule 1, Federal Rule 3.07, Indiana Forms of Pleading and Practice.)

Under Federal Rule 3.08, Trial Rule 1 in Indiana Forms of Pleading and Practice:

> "As noted above an action should be deemed "commenced" when the complaint is filed with the clerk **even though summons has not yet been issued or the filing fees paid**. [emphasis added] What then if a plaintiff refuses or fails to cause summons to be issued to pay the filing fees within a reasonable time after filing the complaint? Under Trial Rule 41, the court is empowered to dismiss the complaint for failure of a party to prosecute the action, comply with the rules or with any order of the court."(Indiana Forms of Pleading and Practice, Trial Rule 1, Federal 3.08).

If the Indiana Supreme Court had wanted to require that the summons be filed on the same date the complaint is filed, it has had the power to create that requirement by amending T.R. 3 and T.R. 4 and also amending the Small Claims rules and publishing in advance its new rules. This Small Claims case is not the appropriate forum for a first impression opinion or commencement of an action because the vast

majority of Small Claims parties never read caselaw. The Small Claims is not governed by the rules of civil procedure, but by the law of substantive justice and "simplified procedure ...established by rule" I.C. § 33-11.6-4-6"So any requirement in the rules must be as readable as paying utility bills. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.ED. 2d 30 (1978).

The Indiana Supreme Court can order that the pre-printed form for the Small Claims complaint, and the Small Claims rules contain a notice to all plaintiffs about when they must pay the fee for court costs, and that the case will be automatically terminated if it is not paid by so many days after the complaint is filed. Then, if the court costs has not been paid within a reasonable time, a specific notice of "threat of termination" under T.R. 41 can be sent to the plaintiff ordering that the fee must be paid for the

case to proceed, as when utilities are shut off.

Adequate notice of the law by Small Claims rule and court notice during proceedings warning of dismissal will protect the Small Claims plaintiffs investments often made from hard-earned low wages.

Statutory interpretation was used by the Indiana Court of Appeals:

> "Furthermore, the rules clearly state that parties should be able to represent themselves in small claims courts. As noted in **I.C. § 33-11.6-4-6, ' A simplified procedure shall be established by rule to enable any person to file the necessary papers and present his case in court** either to seek or to defend against a small claim **without consulting or being represented by an attorney.'**" (Boostrom vs. Bach, 603 N.E. 2d 867 at 869) [Emphasis added]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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